IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	**MDL 1446**
MARK NEWBY, ET AL.,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO: H-01-3624 AND CONSOLIDATED CASES**
ENRON CORPORATION, ET AL.,	§	
Defendants.	§	

CERTAIN INDIVIDUAL DEFENDANTS' OPPOSITION TO CLASS CERTIFICATION WITH RESPECT TO PLAINTIFFS' § 20A CLAIMS.[1]

INTRODUCTION

In seeking certification of a single mammoth class that includes plaintiffs' insider trading claims under § 20A along with all of plaintiffs' other securities laws claims, plaintiffs are asking this Court to defy controlling Fifth Circuit precedent and ignore the fundamental prerequisites of Fed. R. Civ. P. 23. Plaintiffs' position that they could try the § 20A claims as a single class further ignores the practical realities of what will be required for claimants to establish liability with respect to nearly 450 separate transactions, completed on more than 200 days, by 16 defendants, over a 3-year period. (*See* Ex. A to Pls.' First Am Consolidated Compl)

This sweeping request for class treatment is unprecedented – no insider trading class of anything even approaching this scope has ever been certified – and for good reason. The proof that the individual claimants would have to present to establish their claims would differ in

[1] This memorandum is being filed on behalf of, and is joined by, defendants Lay, Skilling, Causey, Frevert, Horton, Rice, Buy, Pai, Kean, McMahon, Olson, Sutton, and Koenig, all of whom are named in the First Amended Consolidated Complaint as being the subject of plaintiffs' 20A claims.

almost every respect from defendant to defendant, trading day to trading day, and transaction to transaction. It is beyond debate that this Court would have to separately examine the particular circumstances of each transaction (*e.g.*, the material nonpublic information allegedly available to the trading defendant at the time of the transaction) to determine standing, liability, and damages with respect to that transaction. But plaintiffs nonetheless provide no trial plan or road map to suggest how these inevitably individualized determinations could conceivably be managed in a classwide proceeding. Indeed, they do not even mention the § 20A claims in their motion for class certification. Nor do plaintiffs detail how this Court could handle the unavoidable conflicts between proposed class members competing to show that Enron stock was most inflated on the day that they traded, without harming the interests of absent class members Further compounding this problem is that many of plaintiffs' proposed class representatives are woefully incompetent to manage the proposed mass litigation.

The fact is that plaintiffs' proposed class proceeding cannot be certified or tried, consistent with Rule 23 (or indeed, due process), as to either the defendants or the unnamed class members. Because it will be impossible to present classwide proof of each element of the proposed class members' claims, or to avoid intra-class conflicts, the adequacy, typicality, commonality, predominance, superiority, and manageability requirements of Rule 23 cannot be met by plaintiffs' proposed class. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 327 (5th Cir. 1978) (class certification improper in the absence of classwide proof); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (same)

ARGUMENT

The prerequisites for a § 20A claim necessarily turn on numerous individualized issues that cannot be presented at a single classwide trial. Plaintiffs cannot demonstrate standing, liability, or even damages using a common set of classwide proof. Moreover, irreconcilable

conflicts exist between different proposed class members, depending on when they traded. Nor can subclassing solve the intractable problems that would inevitably be created by any attempt to handle plaintiffs' claims on a class basis. A class cannot therefore be certified consistent with the requirements of Fed. R. Civ. P. 23

I. A CLASS CANNOT BE CERTIFIED DUE TO THE LACK OF CLASSWIDE PROOF AS TO ESSENTIAL ELEMENTS OF PLAINTIFFS' § 20A CLAIMS.

A. Plaintiffs Cannot Demonstrate That They Have Standing On A Classwide Basis.

Before even addressing the particularized elements of plaintiffs' 20A claims, this Court must determine whether each claimant has standing to assert such a claim. In order to establish standing, each § 20A claimant must prove actual injury *Whitmore v. Arkansas*, 495 U S. 149, 155, 110 S. Ct 1717, 1723 (1990) (basic constitutional standing requirements); *Buban v. O'Brien*, 1994 U S Dist. LEXIS 8643 (N.D. Cal June 23, 1994) (for insider trading claim under § 20A, "harm to the plaintiff is a necessary factor"); *cf. FMC Corp. v. Boesky*, 727 F. Supp 1182, 1193 (N.D. Ill. 1989) (plaintiff who suffered no damages not entitled to bring insider trading claim under § 10(b)), *aff'd, In re Ivan F. Boesky Sec. Litig.*, 36 F 3d 255 (2d Cir. 1994)

This standing inquiry is inherently individualized, because it depends on when the individual claimant purchased and sold the stock in question, and whether and to what extent the price of the stock was inflated at the time of that purchase and sale. If a claimant's stock was overvalued at the time of sale by the same or greater amount than the stock was overvalued at the time of purchase, notwithstanding the disclosure in the interim of alleged material nonpublic information in the possession of a defendant at the time of the defendant's sale, then that claimant was not injured by defendants' actions and does not have standing. Similarly, if a day-trading claimant purchased and sold stock on the same day, at a profit, that claimant cannot legitimately claim injury as a result of the alleged insider trading. A determination of fact of

injury thus requires an evaluation of the individual purchase and sale prices, and the degree to which each was inflated as a result of particular undisclosed material information, on a claimant-by-claimant basis. It is thus an inherently individualized issue that presents an obstacle to certification of plaintiffs' § 20A claims as a class. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 189 (3d Cir. 2001) (rejecting class certification in part because "[d]etermining which class members were economically harmed would require an individualized analysis into each [claimant's] trade[s]").

B. Plaintiffs Cannot Demonstrate Liability By Means Of Classwide Proof.

The statutory elements of a § 20A claim require individualized inquiries unique to each claimant's individual dates of purchase and sale and the identity of the defendant(s) who allegedly traded contemporaneously with them. To establish a § 20A claim, a plaintiff must prove that a defendant (1) used material, nonpublic information, (2) knew or recklessly disregarded that the information was material and nonpublic, and (3) traded contemporaneously with the plaintiff in the same class of security. (*See* Mem. & Order Regarding Enron Outside Director Defs.' Motions (Mar. 12, 2003) [Dkt. #1269] (hereinafter "March 12th Order") at 31-32.)

Proof of each of these elements is likely to differ from plaintiff to plaintiff because they traded on different days, contemporaneously with different defendants, who possessed different types and amounts of information, about different aspects of Enron's business, which may or may not have been material and/or nonpublic, at different times. It therefore would not be possible to hold a single trial on these issues based on a single set of classwide proof.

During the time period in question, plaintiffs have alleged that Enron was a multi-billion dollar corporation, the seventh largest in the United States. (Compl. ¶¶ 12-13.) As such, it had thousands of employees in hundreds of different divisions, affiliates, and business segments at

hundreds of locations around the world. Plaintiffs' own allegations address several of these different operating entities, which operated in entirely separate business segments. These range from Enron's core wholesale energy business in Houston to its retail energy services business, Enron Energy Services ("EES"), to its broadband services business in Portland, Enron Broadband Services ("EBS"), to name just a few. (Compl. ¶ 36-40.)

The § 20A defendants were employed in a variety of different positions in a cross-section of these separately managed entities in various locations, and a number of them changed their positions or joined or left the company during the class period. The number of trades engaged in during the class period by the various defendants ranged from just one to over 100 trades engaged in pursuant to a 10b-5(1) trading program. Moreover, those defendants that had 10b-5(1) trading programs in place during various time periods are entitled to a presumption against the suggestion that they traded on insider information Others sold stock in connection with the exercise of expiring stock options or upon departure from the company, circumstances not indicative of insider trading. *See, e.g., Greebel v. FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999) Still others retained large amounts of stock right up until bankruptcy was declared, and themselves suffered huge losses – suggesting that they were not privy to insider information. Individual personal circumstances, such as divorce, and varying trading patterns and strategies also distinguish among the defendants Indeed, this Court has already dismissed claims against certain insider defendants on the basis that their alleged pattern of trading is insufficient to suggest that they engaged in improper insider trading. (*See* Mem. & Order re Remaining Enron Insider Defs., dated Apr. 23, 2003, at 18 & 33-36 (dismissing claims against defendants Joseph M Hirko and James V. Derrick, Jr.).) Separate legal arguments would have to be considered as to the circumstances of these trading programs and stock sales before the Court could draw any conclusions about liability as to these defendants' trades.

The following summary of some of the complaint's allegations about the sixteen remaining § 20A defendants demonstrates the variety presented by their differing responsibilities, positions, locations, experiences, and trading patterns within the class period.

Defendant	Position	Entity	Location	Time Period	Trading Timeframe	Other Relevant Factual Variations
Lay	Director and Chairman of the Board, and CEO	Enron Corp.	Houston	At times during the Class Period; he was not CEO	11/23/98 to 7/31/01	10b-5(1) trading program in place for part of the class period
Skilling	Director and President and COO, later CEO	Enron Corp.	Houston	President and COO until 2/01, then CEO until he resigned on 8/14/01	11/4/98 to 6/13/01	10b-5(1) trading program in place for part of the class period
Fastow	CFO	Enron Corp.	Houston	CFO until 10/01, when he was terminated	11/4/98 to 11/7/00	
Causey	Executive VP and Chief Accounting Officer ("CAO")	Enron Corp.	Houston	Entire class period	3/4/99 to 8/2/01	
Frevert	Chairman and CEO	Enron Europe, then Enron Wholesale Services	London, then Houston	Enron Europe from 3/97 to 6/00, Wholesale Services beginning in 6/00	10/27/98 to 12/20/00	sold stock to exercise options
Horton	Chairman and CEO	Enron Transportation Services	Houston	Entire class period	1/7/99 to 6/1/01	sold stock to exercise options
Rice	Chairman and CEO	Enron Capital & Trade ("ECT")– North America, then EBS	Houston	ECT from 3/97 to 6/99; EBS beginning in 6/00	10/30/98 to 8/2/01	sold stock to exercise options and in connection with departure from company
Buy	Management Director and Chief Risk Officer ("CRO"), then Senior VP, then Executive VP and CRO	ECT, then Enron Corp.	Houston	ECT from 1/98-3/99, then Enron Corp.	5/1/00 to 3/5/01	

Defendant	Position	Entity	Location	Time Period	Trading Timeframe	Other Relevant Factual Variations
Pai	Director, Chairman and CEO	EES, then Enron Accelerator	Houston	Until 6/01	1/8/99 to 6/7/01	sold stock to exercise options, and, in 2000, to divide marital assets
Hirko	CEO	EBS	Portland	Until 7/00	2/18/00 to 4/20/2000	sold stock in connection with departure from company
Harrison	CEO and Director	Portland General Electric (CEO) and Enron Corp. (Director)	Portland	Until 5/1/01[2]	11/4/98 to 9/1/00	
Kean	Executive VP and Chief of Staff	Enron Corp	Houston	Since 1999	5/10/00 to 1/31/01	
McMahon	CFO, then Senior VP, Finance and Treasurer, then Executive VP, Finance and Treasurer	Enron Europe, then Enron Corp.	London, then Houston	Enron Europe from 1994-7/98, then Enron Corp. Senior VP and Treasurer 7/98-7/99, then Enron Corp. Executive VP and Treasurer	3/16/00	
Olson	Executive VP, Human Resources	Enron Corp	Houston	Entire class period	2/16/00 to 12/22/00	sold stock in connection with contemplated departure from company
Sutton	Vice Chairman	Enron Corp.	Houston	Until early 2001	11/4/98 to 9/28/00	sold stock to exercise options and in connection with departure from company
Koenig	Executive VP, Investor Relations	Enron Corp.	Houston	Entire class period	1/25/00 to 5/3/01	

Clearly, this kaleidoscope of individual experiences means that each individual defendant had access to a unique universe of information regarding the company's management, financials,

[2] Harrison, the former CEO of Portland General Electric Company, resigned from the Board effective May 1, 2001, not March 31, 2000 as alleged by plaintiffs.

and operations, at different points in time and in different places.[3] The information that an Enron Corp. CEO in Houston may have possessed would be entirely different from that possessed by a finance official in Europe or the head of a subsidiary in Portland, Oregon. Thus, no collective determination can be made as to whether the defendants, as a group, possessed material nonpublic information at the time of any given trade

This analysis makes clear that common proof is not likely to exist even for two defendants who traded on the same day And beyond simply determining what information each of those defendants had available to them on that day, the Court must determine as to each piece of information (a) whether the defendant had actual knowledge of the information, (b) whether it was nonpublic, and (c) whether it was material (measured, in part, by whether the stock price changed once that information was publicly disclosed) The need to trace the individual pieces of undisclosed information over time would further complicate any attempt to group all of the various alleged illegal insider trades together in a single trial.

The variations between individual defendants' access to information and actual possession of that information do not exhaust the variations among the proof that would have to be presented to demonstrate liability under plaintiffs' § 20A claims Plaintiffs' lengthy class period also creates enormous variation that would compel the Court to examine each trading day separately Even the same individual had vastly different information at hand in 1998 versus 2001, and no class determination can be made even as to whether a single defendant had material nonpublic information over the entire class period

[3] Plaintiffs may assert that the fact that each of the § 20A defendants served at some point on the Management Committee is sufficient to demonstrate that they, as a group, possessed material non-public information. This argument is belied, however, by the fact that many members of the management committee are not named as defendants in this claim, and others have already been dismissed because plaintiffs' allegations were insufficient to suggest that they possessed insider information. (*See* Mem. & Order re Remaining Enron Insider Defs , dated Apr 23, 2003, at 18 & 33-36 (dismissing Hirko and Derrick).)

Given this enormous variety in the proof needed to demonstrate the basic elements of plaintiffs' § 20A claims, defendants' collective liability cannot be proven on a classwide basis. At bottom, a determination simply cannot be made as to whether a defendant should be forced to disgorge the profits from a particular trade without investigating what specific nonpublic information that specific defendant knew on that specific date. The class proposed by plaintiffs fails the most basic requirements for certification *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir 1996) (class cannot be certified unless the central elements of plaintiffs' claims are provable on a classwide basis)

C. Proof of Damages Will Require Individualized Determinations.

Even a determination of the damages to which plaintiffs claim they are entitled would require individualized fact-finding that would defeat the purpose of class treatment. While damages under § 20A are capped by "the profit gained or loss avoided in the transaction or transactions," 15 U.S.C. § 78t-1(b)(1), this does not mean that damages can be determined on a classwide basis. As an initial matter, the damages in question are transaction-specific, and thus must be separately determined as to each defendant and each trade at issue. The number of variations created by the hundreds of trades alleged by plaintiffs to constitute impermissible insider trader thus are alone enough to defeat class certification.

But even as to an individual trade/defendant combination, individual claimants' damages will differ Until the disgorgement cap of the entirety of an alleged improper insider trader's ill-gotten gains is reached (and even after, in order to determine apportionment between claimants if their combined damages are greater than the disgorgement-based cap), the basic measure of damages for an insider trading claim is the difference between the price at which the claimant purchased the securities and the price at which that claimant would have purchased them had the omitted information been disclosed, as measured by the price of the stock a reasonable time after

the nonpublic information was disclosed. *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156 (2d Cir 1980). Thus, in order to determine individual claimants' entitlement to damages, they must each present proof of the price at which they purchased the stock, the particular nonpublic information they claim caused their inflated purchase price, the date on which it became public, and the stock price after it was disclosed. Each of these factors would have to be proven on a claimant-specific basis and could not be determined through a single arithmetic formula And, as mentioned above, to the extent plaintiffs' claims exceed the disgorgement cap as to any given trade, damages would have to be apportioned in some manner across the group of claimants. The need for this type of individualized proof of damages constitutes independent grounds to deny class certification with respect to plaintiffs' § 20A claims. *See, e.g., Bell Atl. Corp. v. AT&T Corp.*, 339 F 3d 294, 308 (5th Cir 2003) (class certification improper where individualized damages issues predominate), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 425-26 (5th Cir. 1998) (rejecting class certification in the face of individualized damages issues).

II. PLAINTIFFS' CLASS PROPOSAL IGNORES FUNDAMENTAL CONFLICTS BETWEEN PROPOSED CLASS MEMBERS.

In order for named plaintiffs to be able to "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), their interests must not conflict with those of the class members. *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 185 (3d Cir. 2001); *Troup v. McCart*, 238 F.2d 289, 294 (5th Cir 1956) ("Plaintiff's interest must not, therefore, be antagonistic to, but must be wholly compatible with, those whom he would represent") One purpose of Rule 23(a)'s "adequacy" requirement is to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v.* Windsor, 521 U.S. 591, 625 (1997). Where a class includes different groups with conflicting interests, it cannot be certified. *See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55

F 3d 768, 800-01 (3d Cir. 1995); *Billingsley v. Bachinskas*, 78 F.R.D 407, 409 (N D. Tex. 1978), *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F R.D 230, 241 (W D Tex. 1999).

Plaintiffs' proposed class suffers from fatal flaws because it is riddled with irreconcilable intra-class conflicts relating to the § 20A claims. As an initial matter, each proposed class member has an incentive to show that insider trades made on the days on which that claimant traded reflected the maximum amount of price inflation These conflicts are stark and unmitigated in the § 20A context. While plaintiffs may attempt to argue that all claimants have a common interest in proving a fraudulent scheme, that cannot gloss over the antagonistic interests of the individual § 20A claimants In the § 20A claim context, the *only goal that matters* to any particular plaintiff is to maximize the stock inflation claim for a particular trading day, necessarily at the expense of claimants for the other days. Thus, to the extent that the class encompasses trades on more than one day, individual class members have diametrically opposed objectives that foreclose the propriety of class treatment *See In re Merrill Lynch Sec.*, 191 F.R D. 391, 398 (D.N J. 1999), *aff'd*, 259 F 3d 154 (3d Cir. 2001)

In addition, the class that plaintiffs have proposed here includes all purchasers during the class period By definition, this class includes persons with conflicting interests, because it is not limited to those who suffered losses as a result of defendants' actions Indeed, although the proposed class representatives claim to have lost money, the class as defined applies even to those who bought and sold at profitable times, benefiting from their stock investment.

These conflicts could play out practically in the litigation in a number of ways detrimental to certain members of the class. For example, should an attempt be made "to compute damages through statistical means, the resulting sum would have to be allotted among those who suffered damage under plaintiffs' theory of liability and those who suffered no damage and were simply seeking a windfall. This produces inevitable conflict." *In re Merrill*

Lynch Sec., 191 F.R.D. at 398. Similarly, to the extent that some individuals may have benefited from defendants' actions during the class period, their interests will not be properly represented by the named plaintiffs, who are focused on proving that defendants' actions were improper. *See Bonser v. New Jersey*, 605 F. Supp. 1227, 1235-36 (D N J. 1985) (class certification improper where class included persons who may have profited).

Because some class members' interests are therefore antagonistic to each other and to the class representatives' interests, the adequacy requirement is not met and class certification should be denied. *See Bonser*, 605 F. Supp. at 1235-36 (adequacy not met where some class members gained from defendant's actions); *In re Merrill Lynch Sec.*, 191 F R.D. at 398 (under similar circumstances, adequacy "must be questioned")

III. PLAINTIFFS' CLASS PROPOSAL IS WHOLLY UNMANAGEABLE.

A. The Myriad of Individualized Issues Cannot Be Marshaled Into Any Coherent Trial Plan.

Again and again, the Fifth Circuit has emphasized that in order for a class to be certified, plaintiffs must be able to articulate a coherent and manageable trial plan at the outset. *See, e.g.*, *Castano*, 84 F.3d at 744; *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F 3d 205, 220 (5th Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003). Plaintiffs obviously have not done so with respect to their § 20A claims, given that their motion papers do not make even passing reference to how those claims could be tried. It is not surprising, however, that they fail to do so, because it is simply impossible to devise any method by which these inherently individualized claims could be tried on a class basis

Because of the need for the jury to examine the circumstances of each trade separately – in order to determine whether that specific transaction constituted an impermissible insider trade that entitles contemporaneous traders to disgorgement – any "class" trial would necessarily

devolve into a series of mini-trials, one for each transaction, rendering class treatment improper *See, e.g., O'Sullivan*, 319 F.3d at 744 (ruling that the potential that the case may "degenerate in practice into multiple lawsuits separately tried," renders class treatment inappropriate)

Plaintiffs' proposed class poses insurmountable problems of manageability that defeat the efficiencies that sometimes are achieved by means of the class device As an initial matter, the sheer amount of time that would have to be devoted to the inevitable series of mini-trials would easily clog this Court's docket for over a year, even if only one day were devoted to trying the individual questions of standing, damages, and the defendant's knowledge and trading, for each of the nearly 450 transactions at issue

In addition, the Court must grapple with a series of ultimately unanswerable questions

- How could jury instructions be devised to cover this broad mass of claims?
- How could the jury be expected to be able to keep track of the different defendants, different pieces of material nonpublic information available and disclosed at various points in time, and different individual transactions over the three-year period, so as to be able to make a separate determination on liability as to each one?
- Would they be asked to respond to more than 400 interrogatories to establish liability and damages as to each trade in question?
- Even if these problems could be solved, how could any plan be devised whereby standing would be determined on a classwide basis, without each claimant appearing before the Court and presenting proof as to the circumstances of the individual stock purchases and sales?

Simply put, the class device would have no purpose or benefits with respect to the § 20A claims, and any attempt at a classwide trial would hopelessly founder in problems of manageability. Because of the need for individualized inquiries, the Court would be faced with the Hobson's choice of allowing an unending succession of mini-trials to spiral out of control, or streamlining proof and otherwise cutting constitutional corners, thereby endangering the rights of

defendants and of unnamed class members whose claims differed from those of the class representatives. Under the circumstances, no class can be certified *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (the need for individualized showings defeats the efficiencies of the class action mechanism); *Patterson v. Mobil Oil Corp.*, 241 F 3d 417, 419 (5th Cir. 2001) (same), *Smith v. Texaco, Inc.*, 263 F.3d 394, 416 (5th Cir. 2001) (rejecting class certification on manageability grounds), *vacated and withdrawn on other grounds*, 281 F 3d 477 (5th Cir 2002); *Castano*, 84 F.3d at 748-52 (emphasizing need for rigorous manageability inquiry and rejecting class in face of severe manageability problems).

B. Subclassing Cannot Solve The Inherent Problems In Plaintiffs' Class Proposal.

Plaintiffs may argue that because several of the elements of a § 20A claim are defendant-specific, the Court could eliminate the myriad of individualized issues by subclassing by defendant, or by proposing some other system of subclasses. Subclassing cannot solve the problem here, however, because of the large number of individual transactions – 446 different trades on 244 different days by 16 defendants – that plaintiffs are challenging as prohibited insider trades.

Any potential subclassing scheme would require that subclasses be created for each trade in question – for the obvious reason that a determination that one defendant traded in possession of material nonpublic information on a particular date would not be dispositive of whether that defendant did so on a different date, nor would it have any bearing on whether another defendant had done so on the same date or on another date *See In re Microstrategy, Inc.*, 115 F Supp 2d 620, 663 (E.D. Va. 2000) (dismissing claims against defendant for whom there was no contemporaneously trading representative plaintiff and those relating to a day on which no class representative had traded); *Feldman v. Motorola, Inc.*, No 90 C 5887, 1994 U S Dist LEXIS

14809, at *4 n.2 (N D. Ill. Oct. 14, 1994) (subclasses of class members who traded contemporaneously with a particular defendant's particular trade necessary "[b]ecause an insider trading claim must be based on a particular inside trade"); *In re Worlds of Wonder Sec. Litig.*, No C. 87 5491 SC, 1990 U.S. Dist. LEXIS 8511, at *27 n.19 (N.D. Cal Mar 23, 1990) (subclasses of "all class members who traded WOW shares contemporaneously with a particular trade" needed). Every such subclass would have to be represented by its own class representative. *See Johnson v. Am. Credit Co. of Ga.*, 581 F 2d 526, 532-33 (5th Cir. 1978) (Fed R. Civ. P 23(c)(4) requires that all subclasses meet the same requirements for a class action, including the requirement of adequate representation); *Payne v. Travenol Labs., Inc.*, 673 F 2d 798, 812 (5th Cir. 1982) ("[E]ach subclass must be headed by a person who claims the same injury as the subclass . "); *In re U.S. Surgical Corp. Sec. Litig.*, Civ No. 3 92cv374(AHN), 1995 U S Dist LEXIS 20895, at *73 n.23 (D. Conn Apr. 12, 1995) (non-contemporaneous trader could not represent subclass); *In re Cypress Semiconductors Sec. Litig.*, No C-92-20048 RPA, 1994 WL 669856, at *3 (N.D. Cal. 1994) (holding that "the failure of [plaintiff] to be certified as a class representative compels the dismissal of plaintiff's 'insider trading' claim"), *cf. In re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1489 (N.D. Cal. 1992) (where plaintiff lacks standing to bring a § 20A claim personally, that plaintiff cannot represent the class), *aff'd*, 11 F.3d 865 (9th Cir. 1993).[4]

Leaving aside the fact that plaintiffs have not named class representatives that could represent even a fraction of these hypothetical subclasses, the sheer number of subclasses needed would defeat the purpose of class treatment and would render the entire case so fractured and convoluted as to fail the "manageability" test of Rule 23(b)(3). *See In re Worlds of Wonder Sec.*

[4] Indeed, plaintiffs' counsel acknowledged as much when he indicated at a hearing in 2001 that plaintiffs intended to come forward with a contemporaneous buyer for "every single sale" at issue on plaintiffs' 20A claims. (*See*

Litig., 1990 U.S. Dist. LEXIS 8511, at *27 n 19 (suggesting that even just 48 per-trade subclasses could become so cumbersome as to require decertification); *Texaco, Inc.*, 263 F 3d 394 (district court abused its discretion in certifying class action in face of intractable manageability problems). Moreover, even a large number of subclasses could not eliminate the need for individualized inquiries as to standing and damages. Accordingly, even subclassing would not mitigate the irremediably varied proof that would have to be presented for all of the members of plaintiffs' proposed class to establish their claims *See id.* (argument that manageability problems may be solved through subclassing "underestimate[s] the logistical demands created by the right to jury trial coupled with the individual inquiries")

IV. SHOULD A CLASS OR SERIES OF CLASSES BE CERTIFIED, THE PARAMETERS OF THE CLASS MUST BE LIMITED BY A ONE DAY TRADING WINDOW.

Should this Court nonetheless deem it proper to certify some type of § 20A class or set of subclasses, it should specify that the membership in that class or those subclasses must be limited to persons who purchased stock within one day after a defendant sold his or her stock Earlier in this case, this Court considered the requirement under § 20A that plaintiff have traded "contemporaneously" with an illegal insider trade, in connection with a motion to dismiss filed by certain Outside Directors of Enron. (*See* March 12th Order at 31-35.) Although the § 20A claims against the Outside Directors were dismissed on other grounds, the Court nonetheless examined the case law regarding what time period could be considered "contemporaneous," and concluded that a "restrictive reading of the term" (*id.* at 35), was appropriate, particularly in light of the fact that the securities in question were "traded in large amounts on the biggest national exchanges." (*Id.* at 34.) Based on this reasoning, the Court observed that "two or three days,

---

Transcript of Hearing, dated Dec. 7, 2001 (attached at Exh. A), at 17 & 110.)

certainly less than a week, constitute a reasonable period to measure the contemporaneity of a defendant's and a plaintiff's trades under § 20A." (*Id.* at 35)

Although it was unnecessary in the context of the Court's prior ruling to determine exactly what the "cut-off" should be for a claimant to assert a § 20A claim against one of the defendants, it would be necessary for such a time limit to be definitively established for the purposes of defining any insider trading class or a set of subclasses associated with each alleged insider trade. Defendants urge the Court to limit the "contemporaneous" trading window to one day, consistent with a growing body of case law applicable to stocks with high trading volumes.

The rationale for the "contemporaneity" requirement is that it serves as a substitute for the traditional requirement of privity between plaintiffs and defendants *In re Aldus Sec. Litig.*, No. C92-885C, 1993 U.S. Dist. LEXIS 5008, at *21-22 (W.D. Wash. Mar 1, 1993) (contemporaneous trade requirement functions as a substitute for privity); *Buban v. O'Brien*, No C 94-0331 FMS, 1994 U.S Dist. LEXIS 8643, at *7 (N D Cal. June 16, 1994) ("The requirement of contemporaneousness developed as a proxy for the traditional requirement of contractual privity . . ."); *Neubronner v. Milken*, 6 F.3d 666, 670 (9th Cir 1993) ("[T]he contemporaneous trading rule ensures that only private parties who have traded with someone who had an unfair advantage will be able to maintain insider trading claims ")

Given this rationale, a number of courts have found that the "modern realities of the securities markets support an increasingly strict application of contemporaneity " *See In re Microstrategy, Inc. Sec. Litig.*, 115 F. Supp 2d at 663; *see also In re AST Research Sec. Litig.*, 887 F. Supp. 231, 233 (C.D. Cal. 1995). In particular, courts have cited the dynamic nature of the securities markets, high daily trading volumes and the danger of making the insider liable to all the world. *See, e.g., In re Microstrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d at 663.

In cases involving stocks traded at high volumes, courts have ruled that it would be impossible for a claimant to have been in privity with the insider defendant after more than one day and therefore that a one day trading requirement should apply In *In re AST Research Securities Litigation*, for example, the court applied a one day trading requirement because the company's shares were heavily traded on a national exchange throughout the proposed class period. 887 F. Supp. at 234. Similarly, in *In re Aldus Securities Litigation*, the Court determined that a one day window was appropriate because of "the unquestionably high volume of Aldus stock traded daily during the period in question." 1993 U S Dist LEXIS 5008, at *22; *see also Copland v. Grumet*, 88 F. Supp. 2d 326 (D.N.J. 1999) (adopting a one day rule), *cited with approval in* In re *BMC Software, Inc. Sec. Litig.*, 183 F. Supp 2d 860, 916 (S.D. Tex 2001) (Harmon, J); *In re Cendant Corp. Litig.*, 60 F. Supp 2d 354, 378-79 (D N.J. 1999) (applying one day rule), *Buban*, 1994 U.S. Dist. LEXIS 8643, at *8-9 (rejecting insider trading claim based on trade three days after defendant's trade because the time lapse rendered it "manifest that plaintiff could not have traded with defendant"), *Backman v. Polaroid Corp.*, 540 F. Supp 667, 671 (D. Mass. 1982) (rejecting insider trading claim based on trades two trading days after the insider trade); *In re Stratus Computer, Inc. Sec. Litig.*, No. 89-2075-Z, 1991 U.S. Dist. LEXIS 21587, at *17 (D. Mass. Dec. 10, 1991) (recommending one day window), *adopted*, 1992 U.S Dist. LEXIS 22481 (D. Mass. Mar 27, 1992)

As the Court pointed out in its ruling, certain courts have strayed from a strict one-day rule. (*See* March 12th Order at 33-34) However, there is no indication that any of these cases involved a heavily traded stock like the Enron shares at issue here.[5] Moreover, the majority of these cases are premised on the now-rejected principle that all trades that occur during the period

[5] Enron's average trading volume from 10/19/1998 through 11/28/2001 was 4,967,622 shares per day. Source. FactSet Research Systems, Inc.

in which the material nonpublic information remains undisclosed meet the contemporaneity requirement. *See, e.g.*, *In re Oxford Health Plans, Inc., Sec. Litig.*, 187 F R D. 133, 138 (S.D.N.Y. 1999); *In re Am. Bus. Computers Corp. Sec. Litig.*, [1995 Transfer Binder] Fed Sec L. Rep. (CCH) ¶ 98,839, at 93,055 (S.D.N.Y. Dec. 9, 1995); *Shapiro v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 495 F.2d 228, 241 (2d Cir. 1974), *O'Connor & Assocs. v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800, 803 (S.D.N.Y. 1983), *In re Eng'g Animation Sec. Litig.*, 110 F. Supp. 2d 1183, 1196 (S.D. Iowa 2000) (relying on *In re Oxford Health Plans, Inc. Sec. Litig.*).[6]

These courts' interpretation of the contemporaneity requirement has generally been rejected in other cases, because it obviously threatens the insider with unlimited liability if the information is never disclosed *See, e.g.*, *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88, 94-95 (2d Cir. 1981) (criticizing *Shapiro* and holding that "[t]o extend the period of liability well beyond the time of the insider's trading simply because disclosure was never made could make the insider liable to all the world. . . . [N]on-contemporaneous traders do not require . . . protection . . . because they do not suffer the disadvantage of trading with someone who has superior access to information."); *Feldman v. Motorola, Inc.*, No 90 C 5887, 1993 U S Dist LEXIS 14631, at *37-38 (N.D. Ill. Oct. 14, 1993) ("Decisions on the question of contemporaneity recognize that liability does not extend beyond the period of contemporaneous trading; otherwise, it could go on indefinitely if the material nonpublic information was never disclosed."), *Neubronner*, 6 F.3d at 670 (following *Wilson*), *see also Buban*, 1994 U.S Dist. LEXIS 8643, at *9-10 (criticizing *Shapiro*) [7]

---

[6] The Court's March 12, 2003 opinion also cites *In re Musicmaker.com Securities Litigation*, No CV00-2018 CAS (MANX), 2001 WL 34062431, at *27 (C.D. Cal. June 4, 2001). (March 12th Order at 34.) That case merely notes that all of the cases referenced in the statute's legislative history provide for a *shorter* contemporaneous time period than the plaintiffs were advocating in the case. 2001 WL 34062431. *In re Musicmaker com Securities Litigation* in no way suggests that the appropriate trading window must be larger than one day. *Id*

[7] Other cases allowing for longer trading windows lack analysis or are simply poorly reasoned *See, e.g., In re Cypress Semiconductor Sec. Litig* , 836 F. Supp. 711, 714 (N.D Cal. 1993) (allowing five day window, without

Finally, it is obvious that many of the cases that embrace longer "contemporaneous" periods were decided quite some time ago – or rely, without analysis, on those early cases This was before the recent technology revolution that has rendered today's markets completely efficient, with instantaneous completion of transactions and assimilation of information. In today's computerized markets, it is possible to determine exactly who traded what and when with minute-by-minute precision. Plaintiffs themselves, in arguing for the "fraud-on-the-market" presumption, have conceded that Enron's securities were "traded in an efficient market, as publicly available information about the Company was quickly incorporated into the price for these securities." (Lead Pl.'s Am. Mot. for Class Certification, dated May 28, 2003, at 26.) Under the circumstances, there is simply no possibility that a next-day trader could have purchased stock sold by one of the defendants at issue here, and no reason whatsoever to expand the contemporaneous trading window beyond a single 24-hour period, if that

In short, both the logic behind the contemporaneity requirement and the well-reasoned, analogous authorities point to the conclusion that only claimants who trade within one day after the alleged illegal insider trade takes place should be permitted to pursue a claim under § 20A Accordingly, the membership in any potential § 20A class or subclass should be limited to persons who can demonstrate that they purchased stock within the 24 hours following a defendant's trade.

---

analysis); *In re Eng'g Animation Sec Litig.*, 110 F Supp 2d at 1196 (allowing three day window, without analysis), *see also Buban*, 1994 U.S. Dist. LEXIS 8643, at *9-10 (criticizing *In re Cypress Semiconductor Sec. Litig.*); *see also In re Microstrategy*, 115 F. Supp. 2d at 663 & nn. 84-85 (casting doubt on *In re Oxford Health Plans, Inc , Sec Litig.*, *In re Cypress Semiconductor Sec. Litig.*, and *In re Am Bus. Computers Corp. Sec Litig.*)

V. MANY OF THE § 20A PLAINTIFFS ARE INADEQUATE CLASS REPRESENTATIVES UNDER RULE 23(a) AND THE PRIVATE SECURITIES LITIGATION REFORM ACT.

Rule 23(a) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act establish requirements regarding class representatives' adequacy and fitness to represent the putative class. *See* Fed. R. Civ. P. 23(a) ("the representative parties will fairly and adequately protect the interests of the class"); 15 U.S.C. § u-4, *et seq.*

The Fifth Circuit interprets the adequacy requirement to mandate an inquiry into "'the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees.'" *Berger v. Compaq Computer Corp.*, 257 F 3d 475, 482 (5th Cir. 2001) (quoting *Horton Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir 1982)). To satisfy this adequacy requirement, "[r]epresentatives should understand the action in which they are involved, and their 'understanding should not be limited to derivative knowledge acquired solely from counsel.'" *Krim v. pcOrder.com, Inc.*, 210 F.R.D 581, 587 (W.D. Tex. 2002) (quoting *Berger*, 257 F.3d at 483 n. 18.) Competent class counsel is not enough on its own; the representatives themselves must be familiar with the case. *See Berger*, 257 F.3d at 483 n.18; *Krim*, 210 F.R.D. at 587. The Fifth Circuit has repeatedly held that an adequate class representative is one with "commendable familiarity with the complaint and the concept of a class action." *Berger*, 257 F.3d at 483, *see also Horton*, 690 F.2d at 484. "Although, certainly, class representatives need not be legal scholars . . plaintiffs do need to know more than that they were 'involved in a bad business deal '" *Berger*, 257 F.3d at 483 (quoting *Kelly v. Mid-Am. Stables Racing, Inc.*, 139 F.R.D. 405, 410 (W D. Okla. 1990)); *see also Kase v. Solomon Smith Barney, Inc.*, H-00-3504, 2003 U.S. Dist. Lexis 16659, at *32 (S D. Tex. Aug. 22, 2003) ("Although a class representative may, and should, rely on the professional judgment of qualified

class counsel, Walter Kase has not shown an inclination to take the active role in monitoring class counsel's activities that is required of a class representative").

Here, notwithstanding lead plaintiff's empty assertion that "[t]he proposed Class representatives have personally demonstrated they are familiar with the facts and allegations of the case, understand the nature of their claims and their responsibilities as a Class representative and will zealously represent the Class," (Lead Pls.' Am. Mot for Class Cert. at 24), the exact opposite is true. As set forth in detail below, many of the § 20A class representatives lack any familiarity with the legal or factual theories of the case, have relied entirely on Lead Counsel for all factual investigation, and cannot even distinguish between the defendants in this action.

Similarly, although lead plaintiff contends that the proposed Class representatives are "well informed about the ongoing status of the litigation and prepared to continue their active role in the case," (*id.*) many have never read a single opinion or order issued by this Court and have not spent more than a few hours on this litigation since its inception. These plaintiffs' unwillingness to engage in even the most basic direction of the litigation is precisely the sort of fatal defect that the Fifth Circuit and courts therein have found to be inadequate.

A. Dr. Richard Kimmerling

During his deposition, Dr. Kimmerling failed to display any knowledge of the sort of basic factual or legal issues of the case that would be necessary to serve as an adequate class representative under the Rule and the PSLRA The following are a few examples:

- Dr. Richard Kimmerling knew only that there "had been fraud and deceit and that [he] had lost ... money." (Kimmerling Dep. Tr. at 22:9-11, attached hereto as Exh. B.) Dr Kimmerling admitted that he did not "know the specifics" regarding who was involved in the alleged fraud (*id.* at 23:8-17), the nature of the fraud (*id.* at 30:19-31.1), or anything other than that Enron restated its financial statements (*id.* at 30 19-32:14).

- When asked who was involved in perpetrating Enron's fraud, Dr. Kimmerling could not identify more than two people (*id.* at 23:18-23), and did not even recognize the names of several defendants (*id.* at 105.16-25).

- Dr. Kimmerling did not know whether he received the complaints prior to their filing (*id.* at 42:20-22), and in any event has not read any of the complaints in their entirety (*id.* at 41:24-42:19) and did nothing more than rely on Milberg Weiss (*id.* at 42:23-43:7).

- In fact, Dr. Kimmerling is a physician (*id.* at 10:2-6), who admits to having had a very limited investing history (*id.* at 78:16-79:5, 86:1-86·9), and lacks financial sophistication (*id.* at 86:14-87·16).

During his deposition, Dr. Kimmerling displayed neither the ability nor the interest in directing or controlling this action that is required of a class representative.

- Dr. Kimmerling testified that he has spent a total of 25 hours on this case since its inception (*id.* at 49:22-50·8). He has no plans other than relying on Milberg Weiss to ensure that the class is adequately represented, (*id.* at 56:5-21), and does not want to spend a lot of time on this case in the future (*id.* at 64·21-23)

- Dr. Kimmerling testified that he believed this Court has issued only two rulings (*id.* at 54:7-10), and did not know whether he had received those rulings or a summary of them prepared by Milberg Weiss (*id.* at 53:23-54 22). In any event, Dr. Kimmerling admitted that whatever he received, he only "skimmed" it, and is "not aware of every detail." (*Id.* at 54:1-2.)

In light of this testimony, Dr. Kimmerling cannot satisfy Fed. R. Civ. P. 23(a) and the PSLRA's requirements for an adequate class representative. *See Berger*, 257 F.3d at 483 n 18, *Kase*, 2003 U.S. Dist. Lexis 16659, at *32; *Krim*, 210 F.R D. at 587.

B. Michael Henning

Despite being a former executive, Mr. Henning similarly demonstrated a complete lack of understanding of the facts of this case during his deposition. At the same time, Mr. Henning has undertaken virtually no effort to manage or control the direction of the litigation. For example.

- Michael Henning testified that he did not receive any of the complaints prior to their filing, and was just "relying on the – the law firm to put together the proper documents to put things in motion." (Henning Dep. Tr 68.7-15, attached hereto as Exh C)

- Moreover, Mr. Henning admitted that he "do[esn't] believe [he's] read the complaints" (*id.* at 71:5-7), or if he did he "read various paragraphs, maybe – maybe looked at certain sections that seemed interesting" (*id.* at 72:25-73:2, 73.10-18; 74:22-75:6)

- Mr. Henning admitted that he didn't believe he has ready any of this Court's opinions or orders. (*Id.* at 71:3-7)

- In fact, Mr. Henning testified that he has spent a total of 10 hours on this case, to date (*id.* at 71:8-20), and has not, and does not plan to, conduct any independent investigation into the facts or claims at issue in this action (*id.* at 97:22-98.3).

Mr Henning's lack of participation in the management and direction of this litigation prevents his certification as an adequate class representative. *See Kase*, 2003 U.S. Dist. Lexis 16659 at *32; *Krim*, 210 F.R.D. at 587.

C. Dr. Fitzhugh Mayo

Dr Fitzhugh Mayo is yet another putative § 20A class representative who displayed virtually no understanding of the legal or factual issues present in this action, as well as no ability to manage or control the direction of the action. To that end, he cannot satisfy Fed. R. Civ. P 23(a) and the PSLRA's adequacy requirements. For instance:

- Dr. Mayo could not identify the vast majority of the Enron defendants (Mayo Dep. Tr at 28:9-19, attached hereto as Exh. D.), or articulate any of the factual or legal issues asserted in the complaint (*id.* at 94:23-95:6).

- Dr. Mayo readily admitted that he relies on Milberg Weiss for all the information he receives concerning the case, the theories and the claims, (*id.* at 111:19-112:11), that he only reads "thirty percent" of what Milberg Weiss sends him (*id.* at 118:21-25), and that he does not seek updates from Milberg Weiss "often" (*id.* at 111 19-112.11).

- Dr. Mayo does not know the Judge presiding over this action. (*Id.* at 93:13-23)

- Dr. Mayo admitted that he has not undertaken any efforts to investigate the facts supporting his claims (*id.* at 95:13-96:2), that he does not "anticipate having any input in the decisions made in this case" (*id.* at 122:10-19), and has not had any input thus far (*id.*).

Dr. Mayo's testimony illustrates that he has virtually no understanding of the claims asserted in plaintiffs' complaint and even less ability to, or interest in, controlling the direction of the litigation. These factors weigh heavily against certification of Dr. Mayo as a class representative.

D. Joseph Speck

Joseph Speck, who is a former certified public accountant, is another named plaintiff who is an inadequate class representative under Federal Rule of Civil Procedure 23(a) and the PSLRA.

- First, Mr. Speck has no recollection of how or why he became involved in this lawsuit, in fact, he called it a "myster[y]." (Speck Dep. Tr. 29.11-30:3, 34·20-35.11, attached hereto as Exh E.)
- Mr. Speck admitted that he was not involved in the initial decision to file this action, (*id.* 30·4-6), and could not recall whether he reviewed any of the complaints prior to their filing, (*id.* at 56·2-13, 57:14-58:10).
- Moreover, Mr. Speck admitted that he has not conducted any personal investigation into the claims asserted in this litigation (*id.* at 58:22-25, 59:1-3), and has no plans other than relying on Milberg Weiss for ensuring that the allegations put forth on behalf of the class are accurate (*id.* at 58·11-21, 82:24-83:1).
- Mr. Speck could not identify numerous defendants (*id.* 82:14-83:7).
- Mr Speck admitted that he has not read a single opinion this Court has handed down and only "received word" of them from counsel (*id.* at 85:20-86:1).

The foregoing testimony makes clear that Mr. Speck has had no role in determining the direction of this litigation, and is unlikely to even monitor lead counsel. As a result, Mr. Speck cannot satisfy Fed R Civ P. 23(a) and the PSLRA's requirements for an adequate class representative. *See Berger*, 257 F.3d at 483 n 18; *Kase*, 2003 U.S. Dist Lexis 16659, at *32; *Krim*, 210 F.R.D. at 587.

E. Ben Schuette

During his deposition, Mr. Schuette displayed a complete lack of familiarity with the facts or parties to this litigation Moreover, Mr. Schuette was unrepentant concerning his total lack of any involvement in the litigation or his blind reliance on counsel.

- Mr Schuette admitted that he did nothing to monitor lead counsel's work on this litigation other than skim the materials that they send him. (Schuette Dep. Tr. at 76:2-18, attached hereto as Exh. F.)

- Mr. Schuette could not identify what position any of the Enron defendants held, except one, and could not identify what any of these defendants allegedly did to cause injury to the class. (*Id.* at 81:1-86:18).

- In fact, Mr. Schuette testified that he bears no responsibility for the allegations in the Consolidated Complaint or verifying their accuracy (*Id.* at 88:21-89.21).

- Mr. Schuette admitted that he has spent a mere five to eight hours on this litigation so far. (*Id.* at 93:4-6)

F. John Cassidy

Finally, John Cassidy is an inadequate class representative because he purports to bring claims as a trustee on behalf of a trust In *McNamara v. Bre-X Minerals Ltd.*, 256 F. Supp. 2d 549 (E D. Tex. 2002), the district court held that trustees do not have standing to pursue 10b-5 claims on behalf of a trust. There, the court reasoned that the language of the US Supreme Court's *Blue Chip Stamp v. Manor Drug Storess*, 421 U.S. 723 (1975), indicates that a trustee cannot bring a 10b-5 claim on behalf of a trust because trustees are not "purchasers" or "sellers" and do not represent the rights of "purchasers" or "sellers." While this decision focused on 10b-5 claims, the rationale applies with equal force to claims made under section 20A of the 1934 Act since that provision also uses the "purchase" and "sale" language. Thus, Cassidy cannot

pursue claims on behalf of the trust in his capacity as trustee making him patently inadequate as a class representative.

Additionally, even if Cassidy were permitted to pursue the trust's claims, he is not an adequate class representative under Fed. R. Civ Pro. 23(a)(4) since his wife, as co-trustee, is not joining him in that role. (See Cassidy Depo at 67:11, 154-155:15, attached hereto as Exh. G.) In *McNamara*, the Texas district court, relying on the California Probate Code, also ruled that a co-executor cannot act as a class representative without the participation of the other co-executor. The court noted that both executors must concur to exercise a power and one could not act without the authority of the other Similarly, Cassidy should not be allowed to act as class representative where his wife, the co-trustee, does not plan to participate in that capacity.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for class certification should be denied as to plaintiffs' claims under § 20A.

Dated: October 23, 2003

Respectfully submitted,

O'MELVENY & MYERS LLP

By: _____
Bruce A Hiler
Jeffrey W. Kilduff
Robert M. Stern
1625 Eye Street, N.W.
Washington, D.C. 20006
Tel: (202) 383-5300
Fax: (202) 383-5414

Of Counsel:
Ronald G Woods
5300 Memorial, Suite 1000
Houston, Texas 77007
Tel: (713) 862-9600
Fax: (713) 864-8738

Attorneys in Charge for Defendant
Jeffrey Skilling

ZUCKERMAN SPAEDER LLP

By: Roger E. Zuckerman by permission Ronald G. Woods

Roger E. Zuckerman
Deborah J. Jeffrey
Thomas B. Mason
Karen Eisenberg
1201 Connecticut Avenue, N.W
Washington, D C. 20036-2638
(202) 778-1800 Telephone
(202) 822-8106 Facsimile

McDADE FOGLER MAINES LLP

By: Murray Fogler by permission Ronald G. Woods

Murray Fogler
Attorney in Charge
State Bar No . 07207300
S.D. ID No.: 2300
Two Houston Center
909 Fannin, Suite 1200
Houston, Texas 77010-1006
(713) 654-4300 Telephone
(713) 654-4343 Facsimile

Attorneys for Defendant
Lou L. Pai

CLEMENTS, O'NEILL, PIERCE,
WILSON & FULKERSON, L.L.P.

By: Jack O'Neill by permission Ronald G. Woods

Jack O'Neill
State Bar No. 15288500
Jason C Norwood
State Bar No. 24027579
Federal ID No. 28825
Federal ID No. 3696
Wells Fargo Plaza
1000 Louisiana Street, Suite 1800
Houston, Texas 77002-5009
Telephone: (713) 654-7607
Telecopier: (713) 654-7690

Attorneys for Defendant
Joseph W Sutton

The Exhibit(s) May

Be Viewed in the

Office of the Clerk